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Francis J. Powers

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## RELIGION AND THE LAW

By

Rev. Dr. Francis J. Powers, C.S.V.\*  
School of Social Science  
Department of Politics  
Catholic University of America

### I.

Religion does have relevancy to law. Religion is a basic component of our legal blood stream. Its influence permeates the whole field of the law. The great concepts which form the framework of our law, both public and private, are essentially religious. Religious and moral ideas and ideals constitute the very soul of our legal inheritance.

Basically, our law rests on a true concept of man as a being possessed of reason, will and a spiritual nature. Our legal traditions are based upon a recognition of the dignity of human life and of those freedoms and liberties which enhance and enrich it. Our law demands respect for life and for the liberty without which it would be spiritually and socially meaningless. The law offers broad protection for those objects which are regarded as immediate extensions of the human personality. It demands respect for property which it views as an institution intrinsically related to the human personality and its fulfillment. Acknowledging man's social nature, our laws have traditionally protected rights of association and communication of ideas. It recognizes that man has spiritual relationships and it respects his conscience.

The very Constitution of this nation is not without religious inspiration. Implicit in it is a recognition of the philosophical truth that the State, whose proper object is the securing of the common temporal good, is limited by the inalienable rights of the human personality. The idea of legal limitation of governmental action, of legal responsibility for official action and the securing of the rights of individuals against arbitrary governmental conduct is the essence of constitutionalism. It is postulated on the concept of the primacy of the individual and the supremacy of reason over force. It is a reflection of the natural law. <sup>1</sup>

The spirit of our fundamental law is opposed to the deposit of unlimited governmental power anywhere. The Fifth and Fourteenth Amendments seek to secure life, liberty and property against arbitrary or unreasonable governmental action. The Constitution seeks to protect the person against summary detention without cause, to protect the home against unwarranted governmental invasion and to safeguard the great spiritual freedoms of speech, press, religion and assembly. The principles of separation of powers, judicial

\* A.M., University of Michigan, 1945; LL.B., University of Michigan, 1945; S.J.D., Catholic University of America, 1948.

1. For a brief but excellent treatment of this point see Corwin, Debt of American Constitutional Law to Natural Law Concepts, 25 Notre Dame Law. 258 (1950).

review, due process, equal protection and the provisions of the Constitution relating to habeas corpus, search and seizure and civil liberties are rooted in the natural law. It is in its implications a deeply spiritual document.

Religiously inspired ideas also pervade our governmental and legal institutions. Ours is a government of laws. Our constitutions and legislative measures have been enacted through a representative process based on the rationality and freedom of man and upon the assumption that they know right from wrong and will strive earnestly for what is right. The judicial process is given substance and sanction by religion.

Our entire system of judicial administration has for its ultimate object the attainment of justice. And the concept of justice is basically religious. Stated simply, justice is a moral virtue which disposes and moves one to respect the rights of others. It is a constant and permanent determination of the will to render to each man that which is his due. It is fundamentally religious and a condition precedent to its existence is a recognition by one man, or by men in association, of the essential spiritual dignity and equality of human nature in their fellow men. Rights and duties, with which the law is much concerned, grow out of this recognition.

Currently, our legislators and courts are concerned with civil liberties, with the basic rights and immunities of the individual. A proper solution to any problem in this area must take into account the fact that these rights and freedoms are rooted in the spiritual. These rights are part and parcel of man's moral endowment. They are claims or demands of the human personality, part of human nature, and hence, inalienable. Liberty is simply the freedom to exercise these rights within the orbit set by reason and just law. Rights and liberties are not ends in themselves but are means to an end, namely, the fulfillment of one's nature. Rights and liberties can have substance and meaning only so long as they are associated with the spiritual nature of man. This is the only sound basis for determining either their extension or limitation.

Religion and morality give to law its ultimate sanction. And our legal system badly is in need of high moral inspiration and sanction. Judicial administration is seriously handicapped by unconscionable conduct by litigants and advocates alike. This is no idle charge. Jurists in increasing numbers are warning us that the entire judicial process is being undermined seriously by perjury on the part of parties and witnesses and the subornation of perjury by lawyers. The sanctity of the oath is vital to the administration of justice. Fear of the penalties of perjury is an inadequate sanction to preserve the integrity of the judicial process.

## II.

Roscoe Pound, foremost American scholar in the realm of jurisprudence, has traced brilliantly the powerful and beneficent influence of religion in the development of the ideas of universality, authority, good faith and the 'higher law' concept in law.<sup>2</sup> These postulates, declared the Dean, form the basis of the modern civil and common law system. A brief examination of the three last mentioned postulates appears particularly timely.

Authority, as a religiously inspired concept, has long been a keystone of the law. In the beginnings of law in the modern world, Pound said, the

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2. Pound, The Church in Legal History, Jubilee Law Lectures 3-97 (Catholic U. Press 1939).

Church taught and lawyers learned from her, and we have since assumed, that what lay behind law in all its meanings was the concept of authority. Religion teaches that authority is not simply or even essentially coercion and that its purpose is more than the erection of a protective system. In origin it is a consequence of the social nature of man and is therefore of mediate divine origin. Its primary function is to govern and to direct. Saint Thomas wrote that to govern means to bring the thing governed in a suitable way to its proper end. Authority, therefore, is chiefly directive. Moreover, it is a unitive principle. Men in society are pursuing a common temporal end and they should orient their activities toward this end. If the ends of society were always clearly defined and readily evident and the means necessary for their attainment perfectly outlined, and all men cooperated harmoniously in the accomplishing of these purposes, there would be no need for authority. But such is not the case. Frequently the end is imperfectly perceived and the most suitable means to attain it, once it is perceived, are not readily evident. Hence, the need for a unifying directive force. The real sanction of authority is the voice of reason. Force is an incident of sanction but authority is much more than force. Authority is the source of social order, social unity, social action and is a necessity in social life. Such is the traditional scholastic concept of authority which has come down to us as a received ideal in the law.<sup>3</sup>

Today, Pound declared, this concept has been discarded in many quarters. The psychological realists tell us that all that is behind law is a fatherly complex satisfying the innate cravings of men to be led by the hand as they were when they were children. The skeptical realists, and their names are legion, hold that the only authority behind law is threats and execution of threats by those who wield political power in society. Law is nothing more than the command of the sovereign State.<sup>4</sup>

Pius XII has been greatly concerned with the rise of a juridical positivism which bases the authority behind law on the naked power of the State independent of any other consideration. This is not to say that advocates of this theory are depraved or brutal men who approve of State excesses. They even talk of morality and its place in social life. Morality should influence the formulation of law. But once enacted or declared as law by the supreme authority of the State it may not be questioned, they say, on grounds of morality and no citizen has the right to be excused from executing or applying it. Juridical positivism disassociates law from dependence upon or conformity with any order transcending the human legislator. It invests the State with an absolute control over the citizen by endowing it with uncontrolled and therefore irresponsible power. The implications of this doctrine on the lawyer, judge and public official are perfectly obvious.

In *Summi Pontificatus*,<sup>5</sup> his first Encyclical, Pius XII spoke of the error of those who "seek to dispense the civil authority from observing any of those higher laws which have their origin in God." The 1942 Christmas Message<sup>6</sup> of Pius condemned the false postulate of juridical positivism

3. See Simon, Nature and Function of Authority, Aquinas Lecture (Marq. U. Press 1940).

4. For a comprehensive bibliography on legal realism see Carlin, Legal Realism and Justice (Col. U. Press 1941). For a very brief summary and appraisal of realist views see the present writer's Religious Liberty and the Police Power of the State 20-26 (Catholic U. Press 1948).

5. Pius XII, *Summi Pontificatus*, on The Function of the State in the Modern World, in Principles for Peace 592-615 (Koenig ed. 1943).

6. Pius XII, Christmas Message (1942), English translation in Principles for Peace, op. cit. supra note 5, at 789.

which "attributes a deceptive majesty to the setting up of purely human laws and which leaves the way open for a fatal divorce of law from morality. . . ." In the same message he called for a constitutionalism which "gives man a right to juridical security, and accordingly grants him a sphere of rights immune from all arbitrary attacks." Speaking to the Union of Italian Catholic Jurists in November of 1949 the Pontiff treated the subject of juridical positivism in detail and set forth a series of norms to be followed by jurists when confronted with it in practice.<sup>7</sup> It is clear, Pius said, that the jurist cannot acquire a social concept of law and cannot formulate a science of jurisprudence unless man is viewed as a spiritual being. The nature of law cannot be derived except from the nature of man, the Pontiff insisted, and the concept of authority which gives vitality, measure and sanction to law is intrinsically related to that nature.

Pius XII and Dean Pound are as one in warning that the cult of stark force unrelated to reason or the nature of man and unrestrained by reference to any transcendent order is becoming the new authority behind positive law.

### III.

Good faith, Pound declared in the Jubilee Lectures, is a fundamental religious conception and no less a fundamental legal conception. Good faith is the substance around which much of our law of trusts, equity, uses, mortgages and restitution is built. It is discernible, too, in other areas of law.

From the twelfth to the seventeenth centuries the principle of good faith had behind it the direct and powerful force of the Church. Civil obligation arose from a promise, from consent, because of the religious implications present. The effect of the promissory oath on our law is immeasurable. In the ages when religion was the predominant force in society a man who did not keep his promise committed a sin and incurred ecclesiastical penalties. Fulfillment and performance of promises and agreements were exacted of the Christian by ecclesiastical courts on the basis of religious obligation without reference to the requirements of legal formality.

The great historians of the Common Law tell us that throughout the Middle Ages the Court of Chancery, composed very largely of clerics and canonists, was the center of the legal system and the political center of the Constitution. The Chancery Courts exercised considerable supervision over the administration of justice in all the King's Courts and granted equitable relief and remedies in instances where in the judgment of the Chancellor the King's Courts, the law courts, had failed to do justice. The Chancery Courts also had jurisdiction over clerics and laymen in ecclesiastical matters, in matrimonial affairs, wills, usuary, defamation and in matters of breaches of faith. During all the creative centuries of the Common Law, Richard O'Sullivan writes, the end of the law was a moral end and for all the great lawyers from Bracton to Mansfield jurisprudence was related to religion and ethics.<sup>8</sup> The lustre of the glorious centuries of the Common Law under the inspiration of the moral force of religion has dimmed in the intervening ages--but it is not entirely extinguished in our legal order today.

Predictability in human affairs is an important value in law and in civilization. In a memorable passage in legal literature Pound wrote that the ability of men to act with assurance in reliance upon the word of fellow men

7. Pius XII, Allocution to Union of Italian Catholic Jurists, English translation in 48 Catholic Mind 53 (1950).

8. O'Sullivan, Christian Philosophy in the Common Law, Aquinas Papers, No. 6 (The Newman Press 1947).

is one of the roots of all human progress. An unprincipled man is one who will not or who may not act according to the norms of moral predictability, he may or he may not keep his word. He is untrustworthy and confidence cannot be reposed in his promises. For the good of the social order, he may have to be coerced into keeping his promises. Law is one of the agencies of such coercion. But the Dean pointed out that law as an instrument of social control has its limitations in this area and that it cannot in fact accomplish the end desired. Religion, morals and law stand behind civilization in maintaining the integrity and predictability in human conduct without which a well ordered social order is impossible. Today, the burden, almost in its entirety, has been shifted to the law. A secularized age has imposed on law a function more proper to religion. The sanction of law now rests on force or on a naive trust in public education rather than on religion. Confidence in the new sanction is misplaced, said the Dean, for the appeal to the secularized conscience "has neither the power of impressing moral precepts which was exerted by the home nor the intelligent organized power of direction and coercion exerted by the Church.-- The confusion and bewilderment as to the real foundations of the legal order and the decline of the religiously inspired concept of good faith in juristic thought has placed the legal order under a heavy burden.

#### IV.

Constitutionalism is in essence a spiritual concept. McIlwain is authority for the proposition that in all its successive stages of development, constitutionalism has one essential quality; it is a legal limitation on government and arbitrary rule for the purpose of securing the basic rights of the individual.<sup>9</sup> In a sentence that has stirred the soul of men down through the centuries, Bracton pronounced the great constitutional principle: "The King is under God and the law." The King is under God and the law; he is bound by the eternal law of God, by the law of reason--the natural law--and by the law of the land. English jurisprudence of the Medieval period saw in law this threefold order.

Constitutionalism is far from a purely negative concept of restraint. It has positive connotations. It indirectly gave rise to the legally free but responsible man of the Common Law. Under the influence of Christian thought every man was regarded by the law as morally and intellectually autonomous and the source of rational action. The natural law demands freedom for the individual in the fulfillment of his personality. Inspired by Christian natural law ideas the Common Law freed men from the legal bonds of serfdom and slavery. To acknowledge that a man was spiritual was to recognize him as free. But if man was rational and free he was also accountable for the use of his freedom. He is answerable for his acts and omissions. On this rational basis has been built much of our law of torts and crime.

The Christian sense of personal freedom and responsibility became the animating principle of the Common Law and wrought a social revolution in England. The free and responsible man became an institution and that institution has come down to us as a sacred heritage.

But the slow decline of the spiritual ideal and religion in social life brought with it a corresponding change in the schools of jurisprudence. In time, the teaching of Machiavelli in "The Prince" on the alleged distinction between

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9. McIlwain, Constitutionalism, Ancient and Modern (Rev. ed., Cornell U. Press 1947). This is an unexcelled brief treatment of the development of the idea of constitutionalism.

public and private morality came to prevail and the idea of juridical positivism arose in one form or another to wage war with the Christian concept of constitutionalism.

In the area of public law, particularly constitutional law, juridical positivism is the culmination of the process of deleting religion and spiritual values from the law. Speaking to the members of the Roman Rota in 1949, Pius XII dwelt at length on the devastating influence of juridical positivism, on the concept of constitutionalism. Stressing the dangers inherent in the tendency of modern States to pervert law into an instrument of policy for the accomplishing of purely political and administrative ends. Pius pointed out that everything which is done or ordered to be done officially is not necessarily true law. "The mere fact", he stated, "of a law being declared by the legislative power as an obligatory norm in the State, this fact, alone and by itself, is not enough to create true law." The belief that everything that is done officially is real law is "an error which is at the basis of State absolutism and which is equivalent to a deification of the State itself." The principle of constitutionalism has vitality only when law restrains arbitrary State action; when arbitrary State action determines what is law constitutionalism is dead.

Pius has been greatly concerned with the moral problem, the question of conscience, which juridical positivism poses in the execution of an unjust law by judges and public officials. May officials cast the burden of responsibility on those who enacted or decreed the measure and proceed to carry it into force or act under it with moral impunity? Is the defence of reliance upon superior command or authority morally and legally acceptable? These are far from simply theoretical questions. The Pontiff noted that the world has recently witnessed and is still experiencing the terrible state to which judges and public officials may be reduced, morally, under the dominance of juridical positivism. The conflict between conscience and unjust law has now reached a critical stage. The defence of reliance on superior command in the execution of unjust law, the Pope also noted, was rejected by the conscience of the civilized world at Nuremburg. <sup>10</sup>

During the creative era of our law jurisprudence was oriented toward God. The ends of the law were measured in terms of religion and spiritual values. The limits of law were gauged in terms of the law of God and the nature of man. In contemporary jurisprudence God, religion and spiritual values are treated frequently as irrelevant factors. The current attitude is typified, I believe, by the statement of Jerome Frank in his well-known "Law and the Modern Mind" that: "The close and avowed relation of law to religion is a matter of the distant past". "The legal profession", he continued, "has long since been split off from the priesthood." It would be idle to deny that this statement is not without considerable factual basis.

Addressing groups of jurists recently, Pius XII presented inspiring descriptions of jurisprudence ennobled by religion and of the role of a true Catholic jurist in the pursuit of his calling. Borrowing the words of the third-century jurist Ulpian, the Pontiff described jurisprudence as: "The

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10. Pius XII recently considered the matter of juridical positivism in the above mentioned Allocution to the Roman Rota, French translation in Documentation Catholique 1543 (1949); also, in an Allocution to the International Congress of Private Law, July 15, 1950, English translation in 48 Catholic Mind 749 (1950). For a good commentary on the point see Sanders, Juridical Positivism, 14 The Clergy Monthly 365 (1950). B.F. Brown and J.B. Keenan, Crimes Against International Law (Public Affairs Press 1950), is a brilliant treatise on the application of natural law concepts to the punishing of aggressive warfare and crimes against international law.

knowledge of things human and divine, the science of right and wrong." 11 After noting the noble objective assigned to juridical science, the pursuit of justice, Pius spoke of the need of spiritual vision for the true lawyer. A jurist worthy of the name, he said, must above all have knowledge of divine things because without this higher knowledge the human panorama with which the lawyer deals would not have complete meaning: "The jurist. . . in the exercise of his profession moves between the finite and the infinite, between the divine and the human, and in this necessary movement lies the nobility of the science he cultivates." 12 Human affairs, with which the lawyer deals, are so intimately entwined with the divine that they cannot be understood completely without reference to God. True, the lawyer is not called to theological speculation, but, Pius said, "yet if he is incapable of rising to the vision of the highest transcendent Reality, from Whose will the order of the visible universe and. . . the human race with its inherent and necessary laws is derived, it will be impossible for him to perceive in all its marvelous unity and its intimate spiritual depths the interlacing of social relations and their regulative norms over which the law presides." 13 The law, said Pius, should lead to God. From God it receives light and clearness, vigor and strength, meaning and content.

Arnold Toynbee in "Civilization on Trial" wrote that Western civilization is now living on the spiritual capital of the past and that such capital faces depletion unless quickly replenished. This generalization might well be applied to law and jurisprudence. The process of renewing the spiritual content of our law and reorienting it toward God presents a formidable but glorious challenge to those who pursue a legal calling.

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11. Pius XII, supra note 7, at 54, 55.

12. Id. at 56.

13. Id. at 55.